84-1816

No.

Office-Supreme Court, U.S.
FILED
MAY 17 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

LARRY SMITH,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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42 pp

QUESTIONS PRESENTED FOR REVIEW

The petitioner Larry Smith, a resident of the State of Florida, respectfully petitions for review of the following questions which have not heretofore been addressed or decided by this Court and which arise under the Fourth Amendment of the United States Constitution:

1. Where a police officer stops an automobile for a motor vehicle violation and then satisfies himself that no such violation exists, does he then have the right to physically enter the passenger compartment of the automobile to observe the driver retrieve the vehicle's registration or identification documents?

2. Where a police officer requests permission of the driver of an automobile to look in the trunk, which is granted, should that consent to view the interior of the trunk be considered consent to search luggage or other containers found within the trunk, or is separate consent necessary for each item sought to be searched?

PARTIES TO THE PROCEEDING BELOW

The following is a list of all parties to the proceedings before the Supreme Court of New Jersey:

1. State of New Jersey, Plaintiff
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   Richard J. Hughes Justice Complex
   Trenton, New Jersey 08625
   Telephone: (609) 984-6500

2. Larry Smith, Defendant
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   New Brunswick, New Jersey 08901
   Telephone: (201) 745-9000

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding Below ii

Table of Contents iii

Table of Citations iv

Opinions of the Courts Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ

I. The entry of the officer into the passenger compartment of the automobile to observe petitioner retrieve documents for the automobile was in violation of the Fourth Amendment. 7

II. Where consent is given to open and inspect the trunk of an automobile, that consent should not be extended to include searches of the luggage inside the trunk. 11

Conclusion 13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), cert. denied, 282 U.S. 873, 51 S. Ct., 78, 75 L. Ed. 771 (1930) 9

Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 419 (1970), reh. denied, 400 U.S. 856, 91 S. Ct. 23, 27 L. Ed. 2d 94 (1970) 9

Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), reh. denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971) 10

Draper v. Maryland, 265 F. Supp. 718 (D. Md. 1967) 10

Harris v. United States, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968) 10

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) 12

Luxenburg v. State, 384 So. 2d 742 (Fla. App. 1980) 12

Moorehead v. State, 378 So. 2d 123 (Fla. App. 1980) 12

New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), on remand, 55 N.Y. 2d 49, 432 N.E. 2d 196 (1982) 9

Contents

Page

People v. Prochnau, 59 Cal. Rptr. 265 (Ct. App. 1967) 10

People v. Sanders, 44 Ill. App. 3d 510, 358 N.E. 2d. 375 (1976)..... 12

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), on remand, 479 F. 2d 1047 (9th Cir. 1973)..... 12

State v. Carnek, 423 So. 2d 511 (Fla. App. 1982) 12

State v. Cuzick, 21 Wash. App. 501, 585 P. 2d 485 (1978) 12

State v. Johnson, 68 N.J. 349, 346 A. 2d 66 (1975) 5

State v. Jones, 195 N.J. Super. 119, 478 A. 2d 424 (App. Div. 1984)..... 10

State v. Parker, 153 N.J. Super. 481, 380 A. 2d 291 (App. Div. 1971) 12, 13

State v. Taras, 19 Ariz. App. 7, 504 P. 2d 548 (1973) 10

United States v. Ferri, 357 F. Supp. 487 (W.D. Wisc. 1973) 10

United States v. Lopez, 474 F. Supp. 943 (C.D. Cal. 1979) 10

United States v. Strahan, 674 F. 2d 96 (1st Cir. 1982), cert. denied, 456 U.S. 1010, 102 S. Ct. 2304, 73 L Ed. 2d 1306 (1982)..... 10

Contents

Page

Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970) 12

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) 11

Statutes Cited:

N.J.S.A. 24:21-19 3

N.J.S.A. 24:21-19(b)(2) 6

28 U.S.C. Section 1257(3) 2

Rules Cited:

Supreme Court Rules, Rule 20(1) 2

United States Constitution Cited:

Fourth Amendment .....i, 3, 6, 7, 9, 10, 13

APPENDIX

Order of the Supreme Court of New Jersey Denying Petition for Certification, Issued March 19, 1985 ..... 1a

Opinion of the Superier Court of New Jersey, Appellate Division, Affirming the Denial of the Motion to Suppress Evidence, Decided January 2, 1985 ..... 3a

Contents

Page

Order of the Superior Court of New Jersey Law Division Denying the Motion to Suppress Evidence, Issued June 9, 1983 ..... 5a

Transcript of the Opinion of the Superior Court of New Jersey, Law Division Denying the Motion to Suppress Evidence, Decided May 20, 1985 ..... 7a

Judgment of Conviction of the Superior Court of New Jersey, Law Division, Issued January 18, 1984 ..... 15a

Middlesex County Grand Jury Indictment No. 32-82 ..... 19a

No. _____

In The

Supreme Court of the United States

October Term, 1984

LARRY SMITH,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

OPINIONS OF THE COURTS BELOW

The order of the Supreme Court of New Jersey denying the petition for certification is reported at ____ N.J.____, ____ A.2d ____ (1985) and is reproduced in the appendix at p. 1a.

The opinion of the Superior Court of New Jersey, Appellate Division was not officially reported, but is set forth in the appendix at p. 3a.

The transcript of the opinion of the Superior Court of New Jersey, Law Division, denying the motion to suppress evidence is set forth in the appendix at pp. 7a. The order of the Superior Court of New Jersey, Law Division, is reproduced in the appendix at p. 5a.

JURISDICTION

Petitioner seeks review of the denial of a petition for certification by the Supreme Court of New Jersey which was rendered on March 19, 1985 and was filed on March 21, 1985. This petition has been filed within sixty days of that date pursuant to Rule 20(1), Rules of the Supreme Court.

The jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey by writ of certiorari is conferred by 28 U.S.C. Section 1257(3) which provides in pertinent part:

> Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J.S.A. 24:21-19. Prohibited acts A.- Manufacturing, distributing, or dispensing - Penalties

> a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:
>
> (1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance; or
>
> b. Any person who violates subsection a. with respect to:
>
> (2) A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than $25,000.00, or both; or
>
> . . . .

STATEMENT OF THE CASE

At approximately 9:10 p.m. on January 18, 1982, petitioner Larry Smith and John Bagley, his passenger, were traveling northbound on the New Jersey Turnpike in a rented Ford Futura bearing a Florida registration when the automobile was stopped by New Jersey State Trooper Harold Vliet for weaving in the righthand lane. The reason given by the trooper for stopping the automobile was that he was concerned that the driver was either tired or intoxicated or that the vehicle was mechanically defective. When both vehicles came to a stop, petitioner exited his vehicle and walked towards the trooper's automobile at which time the trooper concluded from his observations that petitioner was neither tired nor intoxicated. Although petitioner presented a valid Florida driver's license, he advised the trooper that the car was rented and that the registration and rental agreement were still in the glove compartment of the car. Petitioner then offered to produce the vehicle's registration and walked back to his car. According to Trooper Vliet, he followed petitioner because he was curious and because he was fearful that petitioner might have a weapon in the vehicle, although no pat-down for weapons was conducted nor was he placed under arrest.

Before stopping petitioner's vehicle, Trooper Vliet had called for a backup and Trooper Nicolas Theodus arrived at the scene before petitioner re-entered his car to retrieve the registration and the rental agreement. Trooper Theodus was positioned outside the front passenger's door watching John Bagley, who remained seated in the vehicle. Petitioner sat on the driver's seat leaving the driver's door ajar and reached towards the glove compartment which was in front of Mr. Bagley who was sitting in the front passenger seat. Although the testimony of Trooper Theodus was conflicting at the motion to suppress, the common thread throughout most of his testimony was that as petitioner leaned over, a space was created in the interior portion of the vehicle,

and Trooper Vliet, at least from his shoulders up, entered the vehicle or stuck his head and shoulders into it, to observe what petitioner was doing and to "look around" the car. According to Trooper Vliet he entered the vehicle to insure that petitioner would not reach for a weapon. While his head and shoulders were in the car, he observed a greenish-brown vegetation in the ashtray which he believed was marijuana. In fact, the quantity of substance in the ashtray was so minimal that it was insufficient for the State Police Laboratory to even analyze. While inside the car, Trooper Vliet shined a flashlight on the interior, and Trooper Theodus did likewise while standing outside the car. Trooper Theodus alleged that from his vantage point, he could also observe the greenish-brown vegetation in the ashtray notwithstanding the obstacle that both John Bagley and petitioner created when petitioner reached over to retrieve the papers from the glove compartment.

After the rental agreement was produced, both individuals were ordered out of the car and arrested. After explaining to petitioner his *Miranda* rights, the trooper requested permission to "look in" the car even though he never re-entered the car to examine the contents of the ashtray. The trooper and petitioner then walked to the rear of the car, where, according to the trooper, he advised petitioner of his rights under *State v. Johnson,* 68 N.J. 349, 346 A.2d 66 (1975), which provides that before a valid consent can take place, an individual must be advised of his right to refuse the police permission to search and if initially granted can tell the police that they can search no longer. Although he could not recall petitioner's exact words, the trooper testified that petitioner's response was in the affirmative. Trooper Theodus indicated that he also advised both individuals of the same rights. Consent to search forms, which are normally provided to the State Police, were not executed since neither trooper had any in his possession.

The trunk was opened and nothing suspicious was observed since all the trunk contained were articles of luggage. Because

of Trooper Vliet's suspicions based upon his observation of the greenish-brown vegetation in the ashtray, he wanted to search the bags within the trunk and intended to do so. At the trooper's command, petitioner opened the first article of luggage and nothing unusual was found. Beneath the suitcase was a garment bag which Trooper Vliet patted down in order "to find out what was happening" and not because of any fear. Finding a lump in the shape of an oblong sphere in the garment bag, the trooper opened the bag and removed a package wrapped in masking tape which petitioner said contained fruit. According to the trooper, when he commented that the package did not appear to contain fruit, petitioner told him he could open the package if he did not believe him. The package was opened and found to contain two pounds of cocaine. Subsequently, the State Police secured a search warrant to further search the car and later requested petitioner to sign a consent form, which he declined to sign.The execution of the search warrant uncovered more controlled dangerous substances. In all, the police discovered four pounds of cocaine in the vehicle.

On November 23, 1982, petitioner timely filed a motion to suppress the evidence, alleging that the search of the automobile and the seizure of the cocaine was in violation of the Fourth Amendment of the United States Constitution. After four days of testimony, the Superior Court of New Jersey denied the motion by order dated June 9, 1983, ruling that the automobile was lawfully stopped and that the seizure of cocaine resulted from a valid consent search of the trunk and luggage contained therein (*see* transcript of court's opinion set forth in appendix).

On November 11, 1983, petitioner entered a plea of guilty to an indictment charging him with possession of more than one ounce of cocaine with intent to distribute in violation of N.J.S.A. 24:21-19(b)(2) and was subsequently sentenced on January 18, 1984 to serve a term of six years in the New Jersey State Prison.

A notice of appeal to the Superior Court of New Jersey, Appellate Division was timely filed on January 31, 1984. Petitioner appealed from the denial of the motion to suppress the evidence, again urging that the search and seizure was in violation of the Fourth Amendment of the United States Constitution. In an opinion dated January 2, 1985, the Appellate Division affirmed the denial of the motion to suppress the evidence. The Appellate Division affirmed the trial court's ruling that the automobile was lawfully stopped and that the cocaine was seized following a valid consensual search of the contents of the trunk.

A notice of petition for certification was thereafter timely filed with the Supreme Court of New Jersey on February 11, 1985. By order dated March 19, 1985, the petition for certification was denied by the New Jersey Supreme Court without an opinion on the merits being issued. Petitioner now seeks review by this Court of federal constitutional issues raised in the courts of New Jersey and decided adversely to petitioner.

REASONS FOR GRANTING THE WRIT

I.

The entry of the officer into the passenger compartment of the automobile to observe petitioner retrieve documents for the automobile was in violation of the Fourth Amendment.

As noted earlier, the petitioner and a co-defendant were stopped on the New Jersey Turnpike for a minor traffic violation. The petitioner exited his vehicle, walked towards the troop car, and upon request produced a valid Florida driver's license. He advised the officer that the vehicle was rented, and that the rental agreement was located in the interior of the car. Petitioner walked back to the automobile and entered it from the driver's side, reaching over towards the glove box to retrieve the rental agreement.

The trooper followed petitioner because he was "curious" and he was concerned that petitioner might have a weapon in the vehicle, although he never patted him down. As petitioner was leaning over in the direction of the glove box, the trooper stuck his head and shoulders into the car in order to observe petitioner's hands. It was at this point that the trooper, looking around the interior of the car, observed what he believed to be marijuana in the ashtray, and petitioner and his passenger were placed under arrest. Thereafter, following further investigation, petitioner consented to the opening of the trunk and various items of luggage were searched, resulting in the discovery of cocaine.

The physical entry of the officer into the passenger compartment of the vehicle is especially significant, because it was at this time that the officer observed a small amount of marijuana leading to the arrest of the two occupants of the car. Up to this point the only violation of law if any, observed by the trooper was a minor motor vehicle offense, and certainly the officer would not have sought to search the trunk and the luggage as a result of the traffic offense. It was only after the observation of the marijuana that the officer felt it appropriate to request permission to open the trunk of the automobile.

It must be noted that a back-up trooper arrived on the scene and remained outside the vehicle on the passenger side while petitioner sought to retrieve the documentation for the automobile. Although that trooper testified that he too observed the marijuana in the ashtray, but from outside the automobile, it appears that the veracity of his testimony was highly suspect. The defense had called as a witness at the motion to suppress the evidence, a former DEA officer who had conducted tests using an identical automobile and testified that such a small amount of marijuana could not be observed in the ashtray from outside the vehicle.

Nevertheless, there is no doubt that one officer physically entered the passenger compartment of the automobile as petitioner

sought to retrieve the rental agreement from the glove compartment. It was during this physical intrusion that the officer observed the marijuana which resulted in the arrest of the occupants of the car. Petitioner submits that this physical entry into the passenger compartment of the automobile was without probable cause and in violation of the Fourth Amendment.

It is well settled that a motor vehicle which has been stopped by the police may be searched without a search warrant if there is probable cause to believe that it contains contraband or evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), *cert. denied,* 282 U.S. 873, 51 S. Ct. 78, 75 L. Ed. 771 (1930). Moreover, the mere arrest of an occupant of the automobile gives the police broad power to search the passenger compartment of the automobile. *See Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), *reh. denied,* 400 U.S. 856, 91 S. Ct. 23, 27 L. Ed. 2d 94 (1970). Any container found in the passenger compartment may also be searched without the police first obtaining a search warrant. *New York v. Belton,* 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), *on remand,* 55 N.Y. 2d 49, 432 N.E. 2d 196 (1982).

In the instant case, clearly there was no probable cause to believe that the automobile contained contraband or evidence of a crime. Nor had the occupants been arrested prior to the officer entering the vehicle. At worst, petitioner had committed a minor traffic violation, and after the production of the necessary documents, such as his driver's license, registration, and rental agreement, would have been permitted to proceed on his way.

The events which developed, however, led ultimately to the arrest of petitioner and his passenger. Upon the officer's request to produce the rental agreement for the automobile, the petitioner returned to the driver's seat and reached to the glove compartment to obtain the requested paperwork. The trooper, who was leaning

into the vehicle from the driver's side observed a small amount of marijuana in the ashtray, and both occupants of the car were arrested.

It must be noted that items within plain view of an officer may be seized without a warrant, if the officer had a right to be where he was at the time he first observed the evidence. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *reh. denied,* 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971); *Harris v. United States,* 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968). In the case at bar, petitioner submits that the officer had no right to be inside the car as petitioner retrieved the rental agreement and therefore the marijuana was neither lawfully observed or legally seized.

Courts in both New Jersey and other jurisdictions have recognized that under certain circumstances it is reasonable for the police to make a limited search of a vehicle in an effort to determine or verify ownership. *United States v. Strahan,* 674 F.2d 96 (1st Cir. 1982), *cert. denied,* 456 U.S. 1010, 102 S. Ct. 2304, 73 L. Ed. 2d 1306 (1982); *United States v. Lopez,* 474 F. Supp. 943 (C.D. Cal. 1979); *United States v. Ferri,* 357 F. Supp. 487 (W.D. Wisc. 1973); *Draper v. State of Maryland,* 265 F. Supp. 718 (D. Md. 1967); *State v. Taras,* 19 Ariz. App. 7, 504 P.2d 548 (1973); *People v. Prochnau,* 59 Cal. Rptr. 265 (Ct. App. 1967); *State v. Jones,* 195 N.J. Super 119, 478 A.2d 424 (App. Div. 1984). However in the case at bar, petitioner had not failed to produce the requested documentation, but rather was in the process of retrieving it when the officer entered the automobile. To condone the intrusion of the officer into the vehicle to observe petitioner retrieve the documents permits the police to conduct a visual inspection of the interior of the automobile from a vantage point not otherwise permitted.

In summary, petitioner submits that the intrusion of the officer into the automobile was in violation of the Fourth

Amendment, and that the observation and seizure of the marijuana in the ashtray was therefore unlawful. Moreover, the consent searches of the trunk and the luggage, resulting in the seizure of cocaine were clearly the direct result of the exploitation of the initial violation of petitioner's constitutional rights, and therefore must be suppressed as being the "fruit of the poisonous tree". *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

II.

Where consent is given to open and inspect the trunk of an automobile, that consent should not be extended to include searches of the luggage inside the trunk.

The issue presented in this case has not previously been addressed by this Court. Specifically, the issue raised is when and under what circumstances will a consent by a party to a cursory inspection of a particular area permit a more intrusive search of closed containers within that area. Petitioner submits that under the circumstances of this case the consent to a cursory inspection of the trunk of the vehicle did not permit, absent further consent, a search of closed containers within the trunk. In the present case, the contraband seized was discovered in a package wrapped with masking tape inside a garment bag which was located within the trunk of petitioner's vehicle. The record below supports a finding that initial consent was given to inspect the trunk of the vehicle and although it could be inferred that permission was given to open the wrapped package the record does not support a finding that consent was given to either "pat-down" the garment bag, open the garment bag or remove the wrapped package from the garment bag. To the extent that a separate consent is required for each stage of the search, petitioner submits that consent to an inspection of the trunk should not operate to forgive the failure by the State to obtain consent to pat-down and open the garment bag and remove the wrapped package.

There is no doubt that where valid consent is given, a search may be conducted without a warrant and without probable cause. *Vale v. Louisiana,* 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970); *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). For consent to be valid, the State must prove that the consent was freely and voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), *on remand,* 479 F.2d 1047 (9th Cir. 1973).

However, several courts have held that consent to a cursory inspection of a particular area will not be interpreted to authorize a search of containers within that area. Thus, the Court in *People v. Sanders,* 44 Ill. App. 3d 510, 358 N.E. 2d 375 (1976) stated:

> The officer asked the defendant, with whom he was on a first-name basis and who was not under arrest, if he could look into the trunk (of his car). The defendant might reasonably have expected that the officer was looking for some bulky item of stolen property that would be immediately apparent if present in the trunk of an automobile. By acquiescing in the request to look into his trunk, he did not, we think, consent to a probing exploration into a closed container within the trunk.

See also, Luxenburg v. State, 384 So. 2d 742 (Fla. App. 1980) (consent to search box did not permit opening of black plastic bag within box); *Moorehead v. State,* 378 So. 2d 123 (Fla. App. 1980) (consent to look at pool cue did not permit opening of pool cue to discover contents); *State v. Cuzick,* 21 Wash. App. 501, 585 P.2d 485 (1978) (consent to "look in" car did not permit search of suitcase within car); *State v. Carnek,* 423 So. 2d 511 (Fla. App. 1982) (consent to "go aboard" vessel did not permit search of vessel and containers within it); *State v. Parker,* 153

N.J. Super 481, 380 A.2d 291 (App. Div. 1977) (consent to search trunk did not permit search of satchel within trunk).

Thus, it is respectfully submitted that the courts below erred in finding that there was a valid consent for the pat-down examination of the garment bag and the removal of the package of cocaine. Although the record supports, to some extent, a consent to open the trunk, the consent should not have been construed to operate as a consent to search the luggage contained therein. It is urged that the scope of the search was in violation of the Fourth Amendment, and as such is a proper subject for consideration by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted to review the decisions of the courts of the State of New Jersey concerning the significant issues arising pursuant to the Fourth Amendment of the United States Constitution.

Respectfully submitted,

STEVEN D. ALTMAN

BENEDICT AND ALTMAN
Attorneys for Petitioner

ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION, ISSUED MARCH 19, 1985

SUPREME COURT OF NEW JERSEY
C-640 September Term 1984

23,651

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY SMITH,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2474-83T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 19th day of March, 1985.

s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

Order

FILED
SUPREME COURT
MAR 21, 1985
s/ Stephen W. Townsend
D. CLerk

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, AFFIRMING THE DENIAL OF THE MOTION TO SUPPRESS EVIDENCE, DECIDED JANUARY 2, 1985

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2474-83TA

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY SMITH,

Defendant-Appellant.

OPINION OF APPELLATE DIVISION

Submitted December 10, 1984 - Decided JAN 2, 1985

Before Judges King, Deighan and Bilder.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County.

Benedict and Altman, attorneys for appellant (Steven D. Altman, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey,

attorney for respondent (Gilbert Miller, Deputy Attorney General, of counsel and on the letter-brief).

PER CURIAM

Following a *retraxit* plea of guilty to possession of more than one ounce of cocaine with intent to distribute, *N.J.S.A.* 24:21-19(b)(2), defendant received a sentence of six years to state prison and a $25 penalty pursuant to the Violent Crimes Compensation Act. Defendant appeals claiming error in the denial of his motion to suppress evidence seized in a Turnpike search of his car.

After four days of testimony, the trial judge found that the defendant was lawfully stopped by a state trooper on the New Jersey Turnpike and that cocaine was discovered following a consensual search of the contents of the trunk. An examination of the record shows the findings are fully supported by credible evidence present in the record. *See State v. Johnson,* 42 *N.J.* 146, 162 (1964).

Defendant's reliance on *Delaware v. Prouse,* 440 U.S. 648 (1979) is misplaced. Unlike that case, defendant was not randomly selected for police attention but was stopped because of his erratic driving. The car was "weaving" on the highway. The subsequent search, having been consented to, was valid. *See State v. Johnson,* 68 *N.J.* 349 (1975).

Affirmed.

A TRUE COPY
s/ Elizabeth McLaughlin
Clerk

ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION DENYING THE MOTION TO SUPRESS EVIDENCE, ISSUED JUNE 9, 1983

RICHARD S. REBECK
Middlesex County Prosecutor
County Administration Building
New Brunswick, New Jersey 08903
Telephone: (201) 745-3300

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MIDDLESEX
LAW DIVISION (CRIMINAL)

FILE NOS. 82-392; 82-393
IND. NO. 32-82

STATE OF NEW JERSEY,

Plaintiff,

v.

LARRY SMITH,
JOHN D. BAGLEY,

Defendant.

ORDER

This matter being opened to the Court on motion of Steven D. Altman, Esq., and Robert S. Willis, Esq., pro hace vice, attorneys for defendant Larry Smith; Bradley J. Ferencz, Deputy Public Defender, attorney for defendant John D. Bagley; Assistant Prosecutor Vincent LeBlon appearing on behalf of the State; and

Order

the Court having considered arguments of counsel, testimony of witnesses, and for good cause shown;

IT IS ON this 9th day of June, 1983,

ORDERED that defendants' motion to suppress the evidence be and is hereby denied.

s/ Richard P. Muscatello
RICHARD P. MUSCATELLO,
J.S.C.

TRANSCRIPT OF THE OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION DENYING THE MOTION TO SUPPRESS EVIDENCE, DECIDED MAY 20, 1985

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — MIDDLESEX COUNTY

INDICTMENT NO. 32-82
APP. DIV. DOCKET NO. A-02474-83-T04

STATE OF NEW JERSEY,

Plaintiff,

vs.

LARRY SMITH and JOHN D. BAGLEY,

Defendants.

May 20, 1983

Middlesex County Courthouse
New Brunswick, New Jersey

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

B E F O R E :

THE HONORABLE RICHARD P. MUSCATELLO, J.S.C.

TRANSCRIPT ORDERED BY:

STEVEN D. ALTMAN, ESQ.

Transcript

APPEARANCES:

VINCENT LeBLON, ESQ.
Assistant Prosecutor
Attorney for the State

STEVEN D. ALTMAN, ESQ.
ROBERT S. WILLIS, ESQ.
Attorneys for Defendant, Larry Smith

BRADLEY J. FERENCZ, ESQ.
Attorney for Defendant, John D. Bagley

Georgeann Enright, C.S.R.
Official Court Reporter
Middlesex County Courthouse
New Brunswick, New Jersey 08901

* * *

[69] I'm not suggesting that you must reply.

Is there anything else you would like to say to me?

MR. LeBLON: No, Judge. I would just say that I'm not looking to turn the tables around.

THE COURT: That's the defense's position. I understand.

MR. LeBLON: I recognize the burden. I believe the State has met the burden.

THE COURT: Thank you.

Transcript

All right.

This, gentlemen, as you know, is an application seeking to suppress evidence which was seized as a result of what was initially a stop on the Turnpike; and resulted later in the search of the vehicle involved.

The State's position is that the stop was a proper one; and the search was made under one or two or a combination of circumstances—either the observation of marijuana, and also some untaxed cigarettes, which would give rise to probable cause to search further in the vehicle—namely, in the trunk—as well as consent; and I think the State's position is that the [70] consent was given voluntarily by both defendants.

The situation commences with Trooper Vliet being on the Turnpike observing a vehicle which he says was weaving. The vehicle being an out-of-state vehicle, late at night, and that because of the weaving, which I don't think there is any question that we're not speaking of going beyond a particular lane—weaving between the lane—but he came to the conclusion that, perhaps, the operator might be possibly very tired or drunk—to use that language—and they followed the vehicle for approximately a mile and pulled it over. And upon pulling it over, the operator of the vehicle emerged from the vehicle. And that a conversation relative to I.D.—and by "I.D." I mean the driver's license, registration—the driver did produce a valid driver's license. I believe it was a Florida driver's license.

But on the question of the registration he had—instead—a rental agreement—in that this was a rented or hired vehicle; and that to get the rental agreement—if I'm wrong as to the facts, tell me so—the rental agreement was in the glove compartment;

is that [71] right? And that the gentlemen—I believe it was the driver—the driver is Mr. Smith; am I correct?

Smith said he had to get the rental agreement out of the glove compartment.

And the Trooper—as I recall—for his own protection—to be sure that the man wasn't getting something in the glove compartment which could possibly be a threat—accompanied him to the car and looked in—or possibly even leaned in while he was going into the glove compartment to bring out the rental agreement, which turned out to be a valid rental agreement.

There appeared to be some question as to whether the agreement named the driver as the person authorized to operate the vehicle; and that ultimately it was learned on the face of it it did not; but behind the first sheet, there was another small sheet, which was in the nature of what—in the mind of the insurance company—sometimes it might be called a binder addendum, which did name the defendant as the person—one of two who was authorized to drive the vehicle.

In the context of that situation, it [72] is the Trooper's testimony that he observed-this was while he was partially in the vehicle or—at least—leaning into it—or—at least—not in the vehicle—he saw some marijuana in the ashtray area, or marijuana residue in the ashtray, and also some untaxed cigarettes—not bearing the New Jersey tax—on the seat.

I don't recall if there were three or four of them—three or four packs of cigarettes—untaxed—bearing—is it the Carolina stamp?

MR. FERENCZ: North Carolina tax stamp.

Transcript

THE COURT: And that observation—which he saw in the ashtray—was made as a result—I believe—of what is—with the assistance of his flashlight; because this was at night.

And that thereupon the Trooper indicated that when asked, "Do you mind if I look in your car," at one point in this—the basis of the consent really starts with that. And the testimony of the State is that the answer is, "go ahead," or "I don't mind." Something like that. An affirmative reply. [73] There was no objection.

The other Trooper—Trooper Theodos—and I might say that I found the testimony somewhat—I found there was different types—how should I put it—I may be wrong—Theodos was an older person than Vliet—a person who was more experienced—at least he sounded so on the stand. He seemed to be somewhat more affirmative about his testimony. He said he also observed the marijuana from the passenger's side. Vliet—having observed it from the driver's side. And that subsequent to the consent being given—and the testimony is one of the Troopers indicates that they both gave the consent—the other Trooper—in this case—recalled that one of them ultimately led them to the trunk.

Now, gentlemen, I don't recall—you can help refresh my recollection—who opened the trunk? Was it one of the defendants allegedly?

MR. LeBLON: The Trooper testified that the defendant, Smith, produced the keys.

THE COURT: Produced the keys?

MR. LeBLON: And opened it.

Transcript

[74] THE COURT: I think the Trooper possibly opened it.

Let me say, first, we'll get to where we're going—the stop at the very beginning—it's my understanding or finding that the stop was a valid stop. Otherwise, I wouldn't be going to the trunk or anywhere else. It's not a heavy case. I have seen very many motor vehicle stops; but I do think that based on the time of night, the fact that it was a vehicle from out-of-state, I can conceive that it would not be unreasonable for the officer to feel that this might be someone dozing off or someone who might go into another lane and strike another automobile. I conceive that the weaving—rather than a zig-zagging—this is not a zig-zagging—could be a hazard or present the initial start of a hazard. I think it was reasonable for them to stop the vehicle under those circumstances.

But let me put to rest the cigarettes before I go to the question of the search. I think the cigarettes play a part in the picture. I, frankly, am not clear in my own mind whether the Trooper thought that the trunk contained other cigarettes. I do think they, however, add [75] to the climate of what was happening here. They saw the marijuana and the cigarettes.

Frankly, I feel, based on what I have here, there was a valid consent given. They did have the right to go to the trunk.

As I recall, from the testimony, and, frankly, I'm not so much talking about Vliet; but Theodos really impresses me as being a credible, intelligent officer, who, I think, had a fairly good recall of what happened. He was subjected to a barrage of very heavy and very expert cross-examination. As good as I have seen in any Court. I don't say that to pin flowers on anybody. I think Counsel in this case—both Mr. Ferencz and Mr. Willis and Mr. Altman did an excellent job of cross-examination.

Transcript

And I don't think Theodos was damaged very, very much. It's true that we have a problem with respect to some of these times; but I believe that Theodos is giving what I think to be a fairly accurate—I'm not speaking of truthfulness—I'm accepting the truthfulness—whether it's accurate—I think that his testimony makes—seems to help; and I believe the officers when they say that consent was [76] given in this case. I think, perhaps, these gentlemen might have been bluffing. Maybe they figured that maybe they wouldn't bother and we'll keep going with it. I think they have the right to go to the trunk under those circumstances. And I think that the consent continued.

My recollection of the facts was that as they got to each item—almost item for item—as I recall—there was a request and there was no objection—or an assent to some degree in the language.

Accordingly, I find no violation of the constitutional rights. And I'm denying the application, gentlemen.

Submit to me an appropriate order. I'll sign it.

Thank you, Counsel.

MR. LeBLON: Thank you, Judge.

MR. ALTMAN: Thank you, your Honor.

MR. WILLIS: Thank you, your Honor.

MR. FERENCZ: Thank you, your Honor.

(The hearing concluded.)

Transcript

CERTIFICATE

I, GEORGEANN ENRIGHT, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings, to the best of my ability.

s/ Georgeann Enright, CSR
GEORGEANN ENRIGHT, C.S.R.

Dated: 3-7-84

JUDGMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ISSUED JANUARY 18, 1984

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION — CRIMINAL

S.B.I. No. 260621516
DATE OF ARREST 1/18/82

THE STATE OF NEW JERSEY

vs.

LARRY SMITH

Defendant.

JUDGMENT OF CONVICTION AND ORDER FOR COMMITMENT

The defendant on _____ was indicted on Indictment #32-82-01.

The defendant on _____ entered a plea of not guilty to the Indictment for the crime(s) of:

(Please include Title, Statute and Degree) CT. 1-POSS. OF CDS (PURE FREE BASE COCAINE) WITH INTENT TO DISTRIBUTE; CT. 2-POSS. OF CDS (PURE FREE BASE COCAINE) and the defendant having on 11/4/83

RETRACTED PLEA OF NOT GUILTY AND ENTERED A PLEA OF GUILTY TO:

Judgment

CT. 1-POSS. OF CDS (PURE FREE BASE COCAINE) WITH INTENT TO DISTRIBUTE 24:21-19(a)(1) AND 24:21-19(b)(2)

It is, therefore, on JANUARY 18, 1984 Ordered and Adjudged that the defendant be and is sentenced ON COUNT 1, DEFENDANT IS COMMITTED TO THE CUSTODY OF COMMISSIONER OF DEPT. OF CORRECTIONS FOR SIX (6) YEARS. DEFENDANT IS GRANTED NINE (9) DAYS CREDIT ON SENTENCE. $25.00 TO VCCB COUNT 2 IS DISMISSED AS WELL AS IND. 32-82 AS IT RELATES TO CO-DEFENDANT, JOHN BAGLEY THE EXECUTION OF THE SENTENCE IS STAYED PENDING DISPOSITION OF APPEAL. BAIL IS SET AT $25,000.00 NO 10%.

A penalty of $25 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1.

Penalty imposed on count(s) 1 is $25.00 respectively.

Total Fine _____, Total Restitution _____ Total VCCB Penalty 25.00

Installment payments, if applicable, are due at the rate of $_____ per _____

ATTORNEY FOR DEFENDANT
Upon Entry of Guilty Plea or Conviction

STEPHEN ALTMAN, ESQ.
At Time of Sentencing

STEPHEN ALTMAN, ESQ.

Judgment

Defendant to receive R. 3:21-8 credit for time spent in custody

From_____to_____
Days Credit 9

RECEIVED Aug. 16, 1984

STATEMENT OF REASONS, R. 3:21-4(e)

THE AGGRAVATING CIRCUMSTANCES ARE: SERIOUSNESS OF OFFENSE; PRIOR RECORD: RISK DEFENDANT WILL CONTINUE TO COMMIT CRIME; NEED TO DETER DEFENDANT AND OTHERS FROM VIOLATING THE LAW.

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS SENTENCE.

s/ Thomas J. M.
County Clerk
Aug. 15, 1984

s/ G.J.N.
Judge
GEORGE J. NICOLA

A.O.C., Form No. LR-35 1/78
Rev. 2/81

cc: Chief Probation Officers
AOC Sentencing Research Project
Department of Corrections (where defendant sentenced to state correctional institution)

Judgment

County Penal Institution (where defendant sentenced to county penal institution)

MIDDLESEX COUNTY GRAND JURY INDICTMENT NO. 32-82

NEW JERSEY SUPERIOR COURT

MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)

File No. 82-392; 393
Indictment No. 32-82
THIRD GRAND JURY
May 1982 Stated Session

September Term 1981

THE STATE OF NEW JERSEY

vs.

LARRY SMITH
JOHN D. BAGLEY

Defendant.

INDICTMENT

POSSESSION OF A CONTROLLED DANGEROUS (PURE FREE BASE) SUBSTANCE W/I TO DISTRIB.

N.J.S. 24:21-19 (1)
N.J.S. 24:21-19b(2)
POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE (PURE FREE BASE) 24:21-20(a)(2)

Indictment

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT LARRY SMITH AND JOHN D. BAGLEY, on or about the 18th day of January, 1982, in the Township of South Brunswick, County of Middlesex aforesaid and within the jurisdiction of this Court, knowingly did possess a controlled dangerous substance, namely Cocaine in an amount of one ounce or more with at least 3.5 grams of pure free base Schedule II narcotic drug with intent to distribute the same; contrary to the provisions of N.J.S. 24:21-19(b)(2) and against the peace of this State, the government and dignity of the same.

SECOND COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT LARRY SMITH AND JOHN D. BAGLEY, on or about the 18th day of January, 1982, in the Township of South Brunswick, County of Middlesex aforesaid and within the jurisdiction of this Court, knowingly did possess a controlled dangerous substance, namely, cocaine, in an amount of one ounce or more with at least 3.5 grams of the pure free base Schedule II narcotic drug; contrary to the provisions of N.J.S. 24:21-20(a)(2) and against the peace of this State, the government and dignity of the same.

s/ Richard S. Rebeck
County Prosecutor

By: Abraham Chasnoff
Assistant Prosecutor

A TRUE BILL:

s/ Raymond J. Blash
RAYMOND BLASH, FOREMAN